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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

NO. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to James L. Trainor,

Petitioner,

-vs-

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondent.

BRIEF ON THE MERITS IN SUPPORT OF PETITIONER SUBMITTED AMICUS CURIAE BY THE STATE OF INDIANA

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The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, Donald P. Bogard, Chief Counsel and William G. Mundy, Deputy Attorney General, pursuant to Rule 42 of the Rules of the

Supreme Court of the United States, submits its amicus curiae brief on the merits in support of the Petitioner in the above-entitled cause.

INTEREST OF THE AMICUS

The State of Indiana submits this brief because the questions presented by the State of Illinois are equally vital to Indiana and all other states in the Union. The decision of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) was beyond the scope of the Order of Remand from this Court and contrary to the great weight of established authority by this Court.

In Edelman v. Jordan, 415 U.S. 651 (1974), this Court held, inter alia, that the Eleventh Amendment to the Constitution of the United States is a bar to an order by a federal court for payment of retroactive benefits wrongfully withheld by a state. Pursuant

to that Amendment, Indiana, Illinois, and all other states, are guaranteed the right to be exempt from federal judicial encroachment in their affairs, and this Court has so held on numerous occasions.

However, the decision of the Seventh Circuit attempts to do indirectly what this Court has specifically prohibited in this case. Indiana believes that any attempt to circumvent the Constitutional guarantees to states must be opposed, especially when those attempts pose the likelihood of serious financial consequences to state treasuries.

ARGUMENT

This case was before this Court in 1974, styled as Edelman v. Jordan, supra. The decision of this Court was that the Eleventh Amendment acted as a bar to an

order issued by a federal district court for the payment of retroactive welfare benefits.

On remanding this case to the Seventh Circuit, this Court stated, 415 U.S., at 679:

> ...The judgment of the Court of Appeals is therefore reversed and the cause remanded for further proceedings consistent with this opinion. (Emphasis supplied.)

The Seventh Circuit on October 29, 1974 in turn remanded to the District Court. The District Court, upon the motion of the respondent to require notice to members of the plaintiff class, granted such motion and ordered officials of the Illinois Department of Public Aid to send a written notice entitled "Notice of right to appeal denial of benefits" to each member of the plaintiff class whose application for welfare assistance

was delayed in processing during the period between 1968 and 1971. Upon appeal to the Seventh Circuit by the petitioner state official, a three judge panel unanimously reversed the order of the District Court and held that the Eleventh Amendment constituted a bar to such order, and further found that the order attempted to accomplish by indirection an end prohibited by this Court.

The Seventh Circuit thereafter granted Respondent's petition for rehearing en banc and in a majority decision (Judges Pell, Tone, and Bauer dissenting) held that while the precise language used by the District Court would controvert the Eleventh Amendment, "a mere explanatory notice" to applicants advising them of procedures to obtain retroactive benefits would not be barred by the Eleventh Amendment. Wholly aside from

the impropriety of the Seventh Circuit fashioning a new notice on appeal, its action is in clear circumvention of this Court's direction in Edelman v. Jordan, supra.

In speaking to the impropriety of the District Court's original decree in this case as violating the Eleventh Amendment, this Court stated:

> ...It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials. 415 U.S., at 669.

It is beyond dispute that the notice contemplated by the Seventh Circuit has as its basis a past breach of a legal duty on the part of state officials, since that breach allegedly occurred in the period between 1968 and 1971 when applications for assistance were delayed in processing. Moreover, the substance of the order which the Seventh Circuit opines would not be barred by the Eleventh Amendment is to provide the plaintiff class a vehicle by which the members might recover monies from the Treasury of the State of Illinois, and is clearly not a "necessary consequence of compliance in the future with a substantive federal question." See, Fanty v. Commonwealth of Pennsylvania, Dept. of Public Welfare, 551 F. 2d 2 (3rd Cir. 1977).

The Seventh Circuit's rationale that the envisioned "mere explanatory notice" would not violate the proscriptions of the Eleventh Amendment is highly suspect. The Court first notes that the notice would not be a form of "equitable restitution," and thus acceptable under the Eleventh Amendment. The Circuit Court reads this Court's opinion in Edelman v. Jordan, supra, far too narrowly.

Indeed, while this Court held that relief labeled "equitable restitution" was in actuality indistinguishable from an award of money damages against the State and thus constitutionally impermissable, it did not impliedly suggest that other forms of equitable relief, which in reality are designed to effectuate the same result, would be permissable. This Court has noted that other forms of equitable relief may be barred by Eleventh Amendment. Hogood v. Southern, 117 U.S. 52 (1886); In re Ayers, 123 U.S. 443 (1887).

This Court has permitted equitable relief against a State in very limited circumstances, even though such relief might have great impact on a state's treasury. Graham v. Richardson, 403 U.S. 365 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970). It was noted, however, that:

> ...the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissable and often an inevitable consequence of the principle announced in Ex parte Young, supra. (Emphasis supplied.) Edelman v. Jordon, 415 U.S., at 668.

Just as this Court found the lower courts' evasion of the Eleventh Amendment improper in the earlier stage of this litigation, so should it find here. The District Court and the Seventh Circuit seem intent on providing retroactive, as opposed to prospective, relief to the plaintiff class. This

Court has never sanctioned such relief, as constitutionally permissable and to do so here is to invite other federal courts to assist in artful devices to avoid the plain proscriptions of the Eleventh Amendment.

The amicus would submit that the actions of the Seventh Circuit demonstrate a disrespect of this Court's directions in Edelman v. Jordan, supra, and Ford Motor Company v. Department of Treasury of State of Indiana, 323 U.S. 459 (1945), as well as the principles of federalism which were recently reaffirmed in National League of Cities v. Usery, 426 U.S. 833 (1976). The amicus would urge this Court to reject the Seventh Circuit's attempt to chip away the continued viability of the Eleventh Amendment, and reverse the decision of that Court.

CONCLUSION

For all the foregoing, the Amicus Curiae respectfully prays this Court reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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